FILED
DEC 3 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-685

NEVILLE M. TUCKER, *Petitioner*
Vs.
KENTUCKY BAR ASSOCIATION, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

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DECEMBER
~~November~~ 1, 1975

PRESS OF KENTUCKY INVESTORS, INC., FRANKFORT, KENTUCKY

INDEX

	Page
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	1-2
RULES INVOLVED	2-5
CONSTITUTIONAL PROVISION INVOLVED	6
STATEMENT OF THE CASE	6-8
ARGUMENT	8-27
I. The decision below was based on an adequate and independent non-federal ground	8-13
II. The disciplinary proceedings of the Kentucky Bar Association and the Kentucky Court of Appeals did not deny petitioner procedural due process of law under the Fourteenth Amendment to the Constitution of the United States	13-23
III. The decision below is correct and there are no justiciable reasons for granting the writ	23-27
CONCLUSION	28
CERTIFICATE OF SERVICE	28

Page

APPENDIX

A. Order of Board of Governors dated November 13, 1974 . . . . . 1a-2a

B. Letter of notice dated 3a-4a

CITATIONS

Cases:

Commonwealth v. Roe, Ky., 112 S.W. 683 (1908) . 18

Goldfarb v. Virginia State Bar, et al, 95 S.Ct. 2004, 2016 (1975) 26

Kentucky Bar Association v. Judy Ward Smith, 492 S.W. 2d 880 (1973), certiorari denied, 414 U.S. 859 12

Kentucky State Bar Association v. Stivers, 475 S.W. 2d 900 (1972), certiorari denied, 406 U.S. 968 9-11

Morgan v. United States, 304 U.S. 1 (1937) . . . 19

Ruffalo v. Mahoning County Bar Association, 379 U.S. 931 (1964) 13

Ruffalo, In re, 390 U.S. 544, 551 (1968) 13

Southern Railway Co. v. Virginia, 290 U.S. 190 (1933) 21

Waxman, In re, Ky., 160 S.W. 2d 587 (1942) . . 11-18

Page

Constitutional Provisions:

United States Constitution

Fourteenth Amendment, Section 1 6

Court Rules:

Rules of Court of Appeals of Kentucky

3.160 (a) 2

3.170 2

3.210 3

3.230 3

3.240 4

3.250 4

3.300 4

3.330 5

3.370 17

Other Sources:

"Problems and Recommendations in Disciplinary Enforcement," Special Committee on Evaluation of Disciplinary Enforcement, American Bar Association (June, 1970) 14

Stern and Gressman, *Supreme Court Practice*, 3rd Edition (1962) 21

American Bar Association

Code of Professional Responsibility

DR 1-102 (A) (4), (6) 24

DR 9-102 (A) (1), (2) and (B) (3), (4) 24

EC 9-5 25

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OPINION BELOW

The opinion of the Kentucky Court of Appeals (Petition, Appendix 1a-3a) is unreported at this time.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the disciplinary proceedings of the Kentucky Bar Association and the Court of Appeals of Kentucky were conducted in such a way as to deny the

petitioner procedural due process of law under the Fourteenth Amendment of the Constitution of the United States.

2. Whether the evidence supports the findings and judgment of the Kentucky Court of Appeals.

RULES INVOLVED

Kentucky Court of Appeals Rules concerning procedures in disciplinary cases:

3.160 Initiation of Disciplinary Cases

(a) Any complaint against an attorney for unprofessional conduct shall be filed with the Director who shall promptly notify the attorney by certified mail of the complaint and inform him that he has fifteen days to acknowledge receipt of the complaint or respond to the merits.

(b) Neither the Kentucky Bar Association nor any member thereof shall be liable to any member of the Bar nor to any other person charged or investigated by said Association or its officers for any damages incident to such investigation or any complaint, charge, prosecution, proceeding or trial.

3.170 Processing Disciplinary Cases

Upon the expiration of fifteen days, or receipt of response, the Director shall refer the matter together with such investigative evidence as may have been obtained, to the Tribunal to determine whether the complaint should be dismissed or file a charge.

3.210 Processing Cases of Default, Pleas of Guilt or Answers Raising Only Issues of Law.

If no answer is filed after a Respondent is notified, or an answer is filed admitting the charge, or the answer raises only issues of law, the Tribunal shall order the record, together with such investigative evidence as may have been obtained to be submitted to the Board. If the answer raises issues of law, the Chairman of the House shall be notified by the Tribunal and he shall appoint counsel for the Association to file a brief within twenty days and the Respondent may file a brief within twenty days thereafter. After briefs are filed, or the time within which briefs may be filed has expired, the record and briefs shall be forwarded to the President for assignment to a member of the Board for a report.

3.230 Procedure When Answer Raises Issues of Fact.

If the answer raises any issue of fact, the Inquiry Tribunal shall notify the Chairman in order that he may appoint an attorney to represent the Association and a Trial Committee composed of three members of the House, one of whom shall be designated Chairman, possess the qualifications of a Circuit Judge and be so commissioned by the Chief Justice. The Director shall immediately notify each member of his appointment and furnish each with a copy of the pleadings.

3.240 Notice of Appointment of Trial Committee and Hearing

(a) Upon the appointment of a Trial Committee, the Director shall notify the parties of the names and addresses of its members. The Chairman of the Trial Committee shall fix the time and place of the hearing and the Director shall give notice thereof to the parties. Such hearing shall be not less than twenty days after the date of the notice.

(b) The Trial Committee may convene a pretrial conference which shall demand the appearance of counsel representing the respective parties.

3.250 Challenge to Qualifications of Trial Committee

Any time, not later than ten days before the date set for hearing, the respondent may, by motion, challenge for cause any member of the Trial Committee. If the challenge is such as might disqualify a circuit judge, the Chairman of the House shall relieve the challenged member and immediately fill the vacancy.

3.300 Rights of Respondent Against Whom A Charge has been Filed.

The respondent against whom a charge has been filed shall have the right to be represented by counsel and entitled to a hearing before a Trial Committee. He shall have all the rights secured to a party by the Rules of Civil Procedure with respect to the introduction of evidence, the right to compel

the attendance of witnesses; and the production of books, papers and documents or other writings except those contained in the investigative file of the association. He shall have the right to an oral argument or to file a brief before the Trial Committee. He shall be afforded a full opportunity to remain silent, to defend himself by the introduction of evidence and to cross-examine witnesses called against him. If the respondent be unable to employ counsel, the Chairman, upon written request in affidavit form, made within twenty days after service of the charges, shall appoint counsel for the respondent.

3.330 Order of Proceedings and Burden of Proof

The Trial Committee shall determine and regulate the order of proceedings at the hearing. Upon the application of a party or upon direction of the Trial Committee, the Director shall issue subpoenas for the attendance of witnesses or the production of evidence. The burden of proof shall rest upon the Association in a disciplinary proceeding and the facts must be proven by a preponderance of the evidence. In reinstatement hearings, the burden shall rest upon the applicant. Before submission the Trial committee may direct such oral argument as it deems appropriate and receive briefs from all parties on such terms as it may impose. After submission of the case to the Trial Committee, there shall be no further oral argument or briefing either before the Trial Committee or before the Board.

CONSTITUTIONAL PROVISION

United States Constitution, Amendment XIV, Section 1:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On September 13, 1974, a charge containing three counts was filed against petitioner, Neville M. Tucker, by the Kentucky Bar Association's Inquiry Tribunal. The charge was filed after petitioner had failed to file a response or acknowledge receipt of the complaints certified to him on July 22, 1974, and August 1, 1974, as required by RCA 3.160. After the charge was filed, petitioner failed to file a timely answer as required by RCA 3.200. Pursuant to the provisions of RCA 3.210, the Inquiry Tribunal entered an order of submission on October 10, 1974, submitting the record, together with its investigative evidence, to the Respondent's Board of Governors for disposition.

On November 12, 1974, petitioner attempted to file a late answer to the charge which became a part of the record. On November 13, 1974, the Board of Governors considered the case.

The order of the Board of Governors reflects that petitioner was adjudicated guilty on Counts I and II by the respective votes of 8-4 and 9-2. The order, filed with the Clerk of the Court of Appeals on November 26, 1974, also states that Count III was not considered in

the decision of guilt. The order provides that on a second roll call by a vote of 9-3 it was recommended to the Court that petitioner be given a public reprimand by the Court of Appeals and required to pay the costs of this action.

The first and second counts of the charge pertain to petitioner's representation of Gloria Jean Brown, East Orange, New Jersey, in a personal injury action. The claim of Miss Brown was settled for $42,666.96 after payment of expenses and attorney's fees. On October 5, 1972, petitioner submitted to Miss Brown under a cover letter a check for $42,000 stating that $666.96 was being retained by him "until I can make the proper adjustments for the last plane ticket and a hotel bill which I neglected to include in the settlement as a deduction," with the added statement that, "You shall hear from me again in a few days at which time I shall make the proper adjustments and forward the balance to you." Miss Brown, through her New Jersey lawyer, made repeated demands on petitioner for the delivery of the remaining funds in the amount of $666.96 by some nine written demands between October 31, 1972, through June 13, 1974. In August of 1973, petitioner submitted to Miss Brown a check for $550.00 which was not honored on two occasions because his checking account contained "insufficient funds". This check was never made good. In April of 1974, after four written demands for delivery of said funds, another check in the amount of $570 was sent to Miss Brown by petitioner. The latter check was returned unpaid because of "insufficient funds". On July 19, 1974, Miss Brown's

New Jersey lawyer filed her complaint with the Kentucky Bar Association. On July 29, 1974, petitioner submitted to Miss Brown a certified check in the amount of $570.00.

The order of the Board of Governors (Appendix A, pp. 1a, 2a) was served on petitioner together with the Rule to Show Cause issued by the Kentucky Court of Appeals, the latter being fully set forth in the Appendix of the Petition, pp. 4a-5a.

Petitioner filed a timely Response to the Rule to Show Cause after several extensions of time were permitted by the Court. On May 9, 1975, the full Court sitting, an opinion was rendered disbarring petitioner from the practice of law. The Court's opinion is based solely on Count II of the initial charge. Petitioner's Motion for Oral Argument was denied by the full Court on June 27, 1975. His Motion to Reconsider was denied on June 27, 1975, as was his Petition for Rehearing.

ARGUMENT

The issues raised by the petitioner in his Petition for Writ of Certiorari concern the constitutionality of the procedures utilized by the Kentucky Court of Appeals in disciplining an officer of the Court.

Each issue raised by petitioner will be answered briefly after a short consideration of the general issues in the case.

I
THE DECISION BELOW

WAS BASED ON AN ADEQUATE AND INDEPENDENT NON-FEDERAL GROUND

The constitutional issues raised by petitioner in his Petition for Rehearing before the Kentucky Court of Appeals were whether or not the disciplinary proceedings by the Kentucky Bar Association and the Court were conducted in such a way as to deny him rights of procedural due process under the Fourteenth Amendment of the United States Constitution. The Court in its Per Curiam Opinion clearly based its decision on independent and substantial non-federal grounds.

Under the Rules of the Court of Appeals and Kentucky case law, the findings of the Board of Governors were only advisory; and the Court itself made an independent examination of the factual and legal issues involved. The Court itself was the only body which could impose any disciplinary action, and there was no denial of procedural due process. All rules of the Court were strictly followed at all stages of the proceeding.

The Court has clearly stated this position in its opinion below citing ***Kentucky State Bar Association v. Stivers***, Ky., 475 S.W. 2d 900 (1972), cert. denied, 406 U.S. 968, stating, in part:

> "The report and recommendations of the trial committee are only advisory to the Board of Governors, as are the Board's recommendations to this court. RCA 3.400, 3.420 (now RCA 3.360, 3.370). This means, of course, that in the end this court must be judge of the factual issues and of the final actions to be taken. The role of fact finder

is neither welcome nor comfortable to an appellate court, but obviously we have saddled it upon ourselves by our own rules for this type of proceeding." (p. 904).

* * *

"But it must be recognized that its action is nothing more than advisory to this Court. So far as we are concerned, the Board proceeding is mainly a screening device by which the respondent may be finally acquitted but cannot be convicted." (p. 904).

* * *

"In a matter as serious as this, the advisory weight of the Board's action can be little more than nortatory, which means in simple English, that the members of this Court are going to exercise their own judgment anyway." (p. 904).

It is equally clear that the court did exercise its own judgment by the fact that it refused to follow the recommendations of the Board concerning recommended discipline. Its judgment concerning factual issues agreed with the recommendations of the Board on the issue of guilt on Count II of the charge.

The constitutional issues raised by petitioner were answered by the Court through the interpretation of Kentucky law and the Rules of the Court of Appeals of Kentucky. There were no federal issues to be decided since the sole basis on which to determine the validity of the petitioner's constitutional arguments rested on the proper interpretation of Kentucky law and standards of conduct set by the Kentucky Court.

Another issue raised by the petitioner in his brief before the Court of Appeals concerned the recommendations made by the Board of Governors. This issue was clearly defined by the Court upon independent nonfederal grounds. The Court held that the recommendations of the Board were only advisory. RCA 3.370.

The Court in its role as fact finder specifically and unequivocally held:

> "The recommendation by the Board of Governors is advisory only. This means that this court must be the judge of the factual as well as the legal issues and of the final action to be taken. *Kentucky State Bar Association v. Stivers,* Ky., 475 S.W. 2d 900 (1972).
>
> "We are of the opinion that the facts set out in Count II, and admitted by respondent, constitute such dishonesty by the respondent as to warrant permanent disbarment from the practice of law. The fact that these checks were returned for "insufficient funds" can only have one meaning, that is the client's funds were no longer intact. Simply stated, respondent had converted these funds to his own use. We see little difference in the facts here and those in *In re Waxman,* 290 Ky., 277, 160 S.W. 2d 587 (1942), which resulted in the permanent disbarment of an attorney. The fact that restitution was made does not alter the initial dishonesty in misappropriating his client's funds. With respect to the client's funds in the hands of an attorney, he is the trustee of an express trust, and converting these funds to his own

> use is such reprehensible conduct as to make him unworthy of public confidence and unfit to discharge in a proper manner his obligations as an officer of the court."

After firmly placing its opinion on the uncontroverted facts in the record, the Court then drew an inference that respondent converted his client's funds to his own use: the *ONLY* inference that can be drawn from a record devoid of any factual defenses. Petitioner clearly admits the issuance of the two checks and their return because of insufficient funds. The only conclusion to be drawn from the admitted facts is that the trust funds of his client were no longer intact and were converted to petitioner's own use. This inference is reasonably drawn from the evidence and does not deserve the review of this Court.

This case is not unlike the case of ***Kentucky Bar Association v. Judy Ward Smith***, Ky., 492 S.W. 2d 880 (1973), certiorari denied, 414 U.S. 859, where the Court of Appeals, exercising its fact finding authority, found from the record that Ms. Smith was guilty of various crimes and perjury at the trial hearing from the transcript formed before the trial committee and disbarred her even though she was given no hearing in these "new findings" before the Court. This Court denied her Petition for Writ of Certiorari when the Kentucky Court's action was challenged.

The petitioner has requested this Court to grant a Petition for Writ of Certiorari, and yet a close examination of the issues involved and a careful reading of the

opinion rendered by the Court of Appeals clearly reveals that the results reached in this case by the Court of Appeals of Kentucky was based upon a clear and careful analysis of Kentucky substantive law, the Rules of the Court of Appeals and the record in the case as a whole. Certiorari certainly should not be granted merely to review the findings of fact made independently by the Court of Appeals of Kentucky and the sound standards of conduct applied to those facts by the Court.

II

THE DISCIPLINARY PROCEEDINGS OF THE KENTUCKY BAR ASSOCIATION AND THE KENTUCKY COURT OF APPEALS DID NOT DENY PETITIONER PROCEDURAL DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Petitioner states on page 11 of his Petition that ***In re Ruffalo***, 390 U.S. 544, 551 (1968), holds that state disciplinary proceedings are "of a quasi-criminal nature". The ***Ruffalo*** case dealt with a federal disbarment proceeding. This Court had before it the state proceeding but denied the Petition for Writ of Certiorari. ***Ruffalo v. Mahoning County Bar Association*** 379 U.S. 931 (1964). While this Court has never, to respondent's knowledge, held that a state disciplinary proceeding lacks due process protections or even granted a Petition for Writ of Certiorari based on a state disciplinary proceeding, it is certainly clear this case raises no important constitutional issue warranting review by this Court in setting a precedent to grant review of unified state bar

disciplinary procedures.

The provisions of Rule 3 of the Kentucky Court of Appeals relating to disciplinary proceedings afford full and complete due process protections outlined in the Justice Tom C. Clark Report, American Bar Association Special Committee on Evaluation of Disciplinary Enforcement, "Problems and Recommendations in Disciplinary Enforcement" (June, 1970). The federal due process requirements cited in *In re Ruffalo, supra,* while not binding on the states, are a reality in Kentucky disciplinary proceedings.

It is significant to note Chief Justice Warren E. Burger's comments on nationwide disciplinary efforts:

> "It is now five years since a committee of the American Bar Association, chaired by my distinguished colleague, Mr. Justice Clark, reported in essence that although we lawyers profess to regulate and discipline ourselves, by and large discipline of professional misconduct of lawyers is virtually nonexistent in most of the fifty States. The American Bar Association is undertaking some steps to implement the Clark report, and in the past year or more there are encouraging signs of more progress than in the previous 25 years. That program demands more impetus and the moral support of the law school community, and of course the support of judges." Remarks of Chief Justice Warren E. Burger, Convocation for the Dedication, J. Reuben Clark, III, Law School, Brigham Young University, Provo, Utah, September 5, 1975.

The constitutional issues raised by petitioner are moot because Rule 3 of the Kentucky Court of Appeals affords a lawyer complete procedural due process of law by any standard. No critical due process question is raised by petitioner. Respondent is aware of no nationwide issue being raised in this case. No evidence is presented of these constitutional issues being raised in any other state proceeding either at the state level or before this Court.

(a) Petitioner was given fair and clear notice as to the reach of the type of discipline to which he might be subject.

At this point it should be noted that petitioner's efforts to join his case with the pending cases before this Court styled *Getty v. Commonwealth of Kentucky ex rel Kentucky Bar Association*, No. 75-125, and *Collis v. Kentucky Bar Association*, No. 75-471, must fail because this action is totally different from the proceeding in these other cases. (Petition, pp. 2-3). Petitioner herein failed to answer the *formal* initial letter of notice of complaint as fully set forth in the Appendix hereto. (pp. 3a-4a). After a charge of unethical and unprofessional conduct was filed, petitioner failed to file a timely answer, thereby, failing to exercise his right to a full due process hearing under RCA 3.230, 3.240, 3.250, 3.300 and 3.330 should the answer have raised issues of fact. The late answer filed on November 12, 1974, when it was due on October 7, 1974, gave the following answer to Count II of the charge:

> "The client was remitted a certified check in

> the sum of $570.00 on July 29, 1974, the said sum representing the amount due her and charges incurred by her in depositing two previous checks which were returned 'for insufficient funds'."

The answer, while untimely filed, is a part of the record before the Kentucky Court of Appeals. Petitioner has admitted the facts on which the Court based its per curiam disbarment proceeding. In both the *Collis* and *Getty* cases, issues of fact were raised and heard in full due process hearings before trial committees before their cases reached the Board of Governors.

Petitioner contends he had no notice of the reach of the disciplinary proceedings and the type of discipline to which he might be subject. This is clearly an erroneous conclusion. The formal letter of notice made it clear the provisions of Rule 3 of the Kentucky Court of Appeals were being followed. Petitioner ignored the notice. The later charge (Petition, Appendix p. 7a) clearly stated:

> "WHEREFORE, complainant charges that such actions by respondent constitute unethical and unprofessional conduct calculated to bring the bench and bar of Kentucky into disrepute; and that discipline of an appropriate degree should be administered to respondent in accordance with RCA 3.380."

RCA 3.380 clearly states the degrees of discipline any respondent is subject to in the Court's discretion.

Respondent ignored the notice in the charge. It is submitted that he ignored the charge because he felt

paying the converted money back would get him off the "hook".

The Board of Governors, on the basis of the record including the complete investigative file of petitioner, ***recommended*** to the Kentucky Court of Appeals a finding of guilt on Count II and ***recommended*** discipline in a degree of a public reprimand by the Court. (Appendix, p. 1a). Petitioner was given clear notice in the order of the Board that it contained only recommendations, and the subsequent Rule to Show Cause stated that petitioner should respond to the degrees of possible discipline from public reprimand to disbarment set forth clearly in RCA 3.380. Petitioner had clear notice of the provisions of RCA 3.370 stating, "any recommendation [by the Board] to the Court that disciplinary action be taken shall be advisory." Petitioner was on notice of the opinion of ***Kentucky State Bar Association v. Stivers, supra***, clearly holding that the Kentucky Court of Appeals was the ultimate fact finder as well as the ultimate determiner of discipline. To say petitioner was "lulled" into a feeling of false security after the Board's recommendation and felt he could receive no more than a public reprimand from the Court is clearly ridiculous without any doubt whatsoever. Petitioner was well aware of the "reach of the grievance procedure".

After disbarment was ordered by the Court, petitioner again had the opportunity to be heard in the form of a Petition for Rehearing. He filed such a petition; however, his only logical argument could be and was he received too much discipline. The facts were admitted. The sound discretion of the Court of Appeals based on prior

Kentucky law as to the discipline warranted could not be reversed on any of petitioner's argument in his Petition for Rehearing.

Respondent argues that his arguments before the Court would have been different had he known he was going to be disbarred. This is a ridiculous argument because he had admitted the facts and the degree of discipline was the only "new" finding of the Court which he did not successfully argue was unfair on Petition for Rehearing.

The *Ruffalo* case has reference to the adequacy of a *charge* before a hearing on the allegations. In this case, petitioner has had more than adequate notice of the charge against him on two occasions prior to the action of the Board of Governors and continuously thereafter so full responses could be made to the charge. The *Ruffalo* test has been met in this case.

The action of the Kentucky Court of Appeals in ordering disbarment should not have surprised petitioner because its conclusion was based on prior Kentucky law in the case of *In re Waxman*, Ky., 160 S.W. 2d 587 (1942). Respondent raised in its brief in the Kentucky Court of Appeals the immorality raised by petitioner's conduct and his breach of integrity and lack of probity under Kentucky law. *Commonwealth v. Roe*, Ky., 112 S.W. 683 (1908). No reply brief was filed by petitioner to answer these arguments. Petitioner had only one argument to make to the Rule to Show Cause and that was why he should not be disciplined, up to disbarment, for his highly unethical conduct.

Respondent agrees with the holding of this Court in

Morgan v. United States, 304 U.S. 1 (1937). It is respectfully submitted that petitioner enjoyed all the safeguards of adequate notice set forth in the *Morgan* decision.

(b) Petitioner was afforded the right to be heard before the Board of Governors of the Kentucky Bar Association and the Kentucky Court of Appeals.

Petitioner's contention that Kentucky disciplinary proceedings are extraordinary in the extent to which they deny due process is totally without merit. It should be noted that petitioner did not raise the issue of the right to be heard before the Board of Governors before the Court of Appeals; therefore, the issue is not properly before this Court. The issue will be answered however.

It is clear petitioner waived any right he had to a full due process hearing on issues of fact and law with the opportunity for calling witnesses, right of cross-examination, the right to testify for himself, including other constitutional safeguards. Respondent filed no timely answer to raise such issues. Even the untimely answer filed raises no issues of fact as to Count II of the charge. The acts alleged in this count were admitted in the answer untimely filed. Had petitioner filed a timely answer which did not raise issues of fact under the rules of the Kentucky Court of Appeals, he could have filed a brief before the Board of Governors as to the degree of discipline warranted under Kentucky law. Petitioner's statement that he had no such opportunity is clearly false. (Petition, p. 17). Petitioner could have been heard before the Board under the facts of this

case; therefore, the proceeding was not *in camera*.

RCA 3.210 clearly provides that where an answer raises issues of law and not issues of fact the respondent herein has twenty days in which to file a brief and petitioner could have twenty days thereafter to file his brief, then the case is submitted to the Board. Petitioner clearly waived his right to this provision when he failed 1) to file a timely answer, and 2) an answer raising the issue of law relating to degree of discipline. Petitioner cannot argue the point now. It is clear this was a "default" case until filed in the Court of Appeals of Kentucky with the order of the Board of Governors.

Obviously, the degree of discipline ordered by the Court of Appeals of Kentucky to the clear fact situation before it is not a federal matter deserving of this Court's review. The state Court had the benefit of petitioner's Response to Rule to Show Cause and a Petition for Rehearing before its mandate issued. It is obvious why a motion for oral argument was denied. No factual defenses were raised. The Court had determined correctly that a lawyer's conversion of a client's funds warrants disbarment; therefore, no benefit could be derived from an oral argument. There was a record before the Court and Board and clear opportunities to be heard on that record.

The Board of Governors under RCA 3.370 serves as a screening device under state law. No federal issue is raised. If, in the opinion of the Board, a case should be dismissed or a private reprimand issued, the case terminates with such action of the Board. If any form of public discipline is considered by the Board it cannot

be ordered effective by the Board. The Board can only recommend to the Kentucky Court of Appeals public discipline in degrees from a public reprimand to disbarment. Final action is by that Court. The Board makes no final decision whatsoever on public discipline. The Court only makes a final determination on the matter after it has received a Response to a Rule to Show Cause and any Petition for Rehearing has been fully considered. Ample opportunity was afforded petitioner to be heard of which he fully availed himself prior to a final determination of his case by the Court. The fact situation of *Southern Railway Company v. Virginia*, 290 U.S. 190 (1933) cited by petition at page 17 of his Petition has no application to this case.

It is respectfully submitted that case law involving administrative proceedings in the executive branch of government with the right of review by the judicial branch are not applicable to original actions in the judicial branch by the court of highest jurisdiction in a state seeking to discipline officers of the court through an administrative arm of the court: its unified bar association. Due process of law must be accorded to an attorney. This had been done without any doubt by Rule 3 of the Kentucky Court of Appeals.

The disciplinary proceedings of the Kentucky Court of Appeals are not unlike disciplinary proceedings before the United States Supreme Court as provided in Rule 8. It appears that where factual issues are raised, the Court may appoint a committee to make an inquiry into the matter and submit a report and recommendation to the Court. Stern and Gressman, *Supreme Court*

Practice, 3rd Edition (1962).

Petitioner contends that the Court of Appeals of Kentucky failed to give weight to the recommendation of the Board of Governors. The Court concurred with the Board on the issue of guilt on Count II and did not consider Count III as the Board had not. The Board and Court disagreed only on the degree of discipline to be administered.

(c) This case raises no constitutional question on the standard of proof required in bar disciplinary hearings.

Petitioner failed to raise the issue of standard of proof before the Kentucky Court of Appeals; therefore, the issue is not properly before this Court. The issue will be answered, however.

It is true that RCA 3.330 provides that respondent must prove its facts by a preponderance of the evidence. The rule has always been such under the rules of the Kentucky Court of Appeals and the opinions of that Court. The standard of proof is a matter of state policy and does not address itself to this Court as a matter of federal law.

The argument as to standard of proof is moot in this case. The opinion of the state court is based solely on admitted facts in the record. An issue of standard of proof cannot arise from an admitted fact situation. The inference of the Kentucky Court of Appeals that petitioner converted his client's funds is clearly warranted from the record. Respondent could not and did not offer any explanation why his client's funds were not intact. In an effort to get his case remanded by the

Court of Appeals he produced, a bank statement, inadvertently, that conclusively showed a lack of funds in the escrow account to cover the checks he issued to his client. Even without drawing an inference of conversion, it is clear the funds were not intact and only disbarment can afford the public adequate protection.

Petitioner enters into speculation that the required "guilt" vote on Count II by the Board of Governors necessary to refer the case to the Kentucky Court of Appeals may have been different (lower) had a greater standard of proof been required. The writer takes this opportunity to observe that the Board of Governors most probably applies the standard of guilty beyond a reasonable doubt in disciplinary cases regardless of the wording of RCA 3.330.

No Kentucky lawyer is disbarred before the Kentucky Court of Appeals without first having his due process rights fully protected by the rules of that Court. Full constitutional safeguards are given a lawyer.

III
THE DECISION BELOW IS CORRECT AND THERE ARE NO JUSTICIABLE REASONS FOR GRANTING THE WRIT

The Per Curiam Opinion of the Kentucky Court of Appeals is based soundly on facts in the record before it. The Court considered all defenses, if any, offered by petitioner and clearly stated so. The Court found no mitigating circumstances in the record in its sound discretion. A fair reading of the record supports the entire opinion of the Court. The opinion clearly states the

evidence it found in the record to support its findings. The Court applied a clear standard to the facts citing the public peril resulting from petitioner's actions and its grave effect on the image of the bench and bar. Disbarment is the only responsible action the Kentucky Court of Appeals could take to protect the public from the gross, dishonest misconduct of petitioner.

On November 11, 1969, by RCA 3.130, the Kentucky Court of Appeals adopted the American Bar Association Code of Professional Responsibility as a sound standard of conduct required of lawyers and that charges can be preferred where those standards are not met. The following provisions of the Code have obviously been breached by petitioner:

"DR 1-102 Misconduct.

(A) A lawyer shall not:

(4) Engage in conduct involving dishonesty. . .

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 9-102 Preserving Identity of Funds and Property of Client.

(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay bank

charges may be deposited therein.

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A lawyer shall:

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.

(4) Promptly pay or deliver to the client as requested by a client the funds, securities or other properties in the possession of the lawyer which the client is entitled to receive."

EC 9-5 of the Code states:

"Separation of the funds of a client from those of his lawyer not only serves to protect the client, but also avoids even the appearance of impropriety, and therefore commingling of such funds should be avoided."

This Court has made clear the strong state interest

of state courts in disciplining its members in the recent case of ***Goldfarb v. Virginia State Bar, et al.***, 95 S.Ct. 2004 (1975) at p. 2016, when it stated:

> "We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety and other valid interests, they have broad power to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that in some instances the State may decide that 'forms of competition usual in the business world may be demoralizing to the ethical Standards of a profession.' *United States v. Oregon State Medical Society,* 343 U.S. 326, 336, 72 S.Ct. 690, 697, 96 L.Ed. 978 (1952), see also *Semler v. Oregon State Board of Dental Examiners,* 294 U.S. 608, 611-613, 55 S.Ct. 570, 571-572, 79 L.Ed. 1086 (1935). The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts'. See *Sperry v. Florida,* 373 U.S. 379, 383, 83 S.Ct. 1322, 1325, 10 L.Ed. 2d 428 (1963); *Cohen v. Hurley,* 366 U.S. 117, 123-124, 81 S.Ct. 954, 958, 6 L.Ed. 2d 156 (1962); *Law Students Research Council v. Wadmand,* 401 U.S. 154, 157, 91 S.Ct. 720, 723, 27 L.Ed. 2d 749 (1971). In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act, we intend no diminution of the authority of the State to regulate its professions."

Petitioner seeks to relitigate his case on non-existent factual issues before this Court. If the Kentucky Court of Appeals gave little significance to the petitioner's evidence, it was due to the lack of credibility of the evidence and not due to an oversight on the part of the court. Here again, petitioner has urged as a reason for granting certiorari an issue which is not valid. The factual determination by the lower court and the weight and credibility accorded to the evidence are not properly reviewable especially where the court, directly in its opinion, reviewed the evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari be denied.

Respectfully submitted,

LESLIE G. WHITMER
Director-Counsel
Kentucky Bar Association
243 State Capitol Building
Frankfort, Kentucky 40601

Counsel for Respondent

CERTIFICATE OF SERVICE

I, Leslie G. Whitmer, Counsel for Kentucky Bar Association, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 1ST day of ~~November~~ DECEMBER, 1975, I served on Honorable Morton Stavis, 744 Broad Street, Newark, New Jersey 07102, Honorable Larry M. Gross, 171 West 33rd Street, Bayonne, New Jersey 07002, and Honorable Robert E. Delahanty, Delahanty & Terry, 701 West Walnut Street, Louisville, Kentucky 40203, Attorneys for Petitioner, a copy of this brief by mailing same, postage prepaid.

Leslie G. Whitmer

LESLIE G. WHITMER

APPENDIX

APPENDIX A

MEETING
BOARD OF GOVERNORS
EXECUTIVE INN
LOUISVILLE, KENTUCKY
NOVEMBER 13, 1974

The next order of business concerned the charge against Neville M. Tucker, Louisville. This charge was submitted to the Board of Governors by the Inquiry Tribunal pursuant to the provisions of RCA 3.210 because respondent failed to file an answer. An answer was tendered by respondent on November 12, 1974.

On call of the roll, the respondent was adjudged guilty as charged on Counts I and II by votes respectively of 8-4 and 9-2. Count III was not considered in the decision of guilt. Upon a second roll call by a vote of 9-3, it was recommended that the respondent be given a public reprimand.

IN RE: NEVILLE M. TUCKER

FINDINGS AND RECOMMENDATIONS OF THE BOARD OF GOVERNORS

The above case having been called and a report having been submitted and the matter having been fully considered, the following Findings and Recommendation are made:

FINDINGS:

That the respondent, Neville M. Tucker, be adjudged guilty as charged in Counts I and II.

RECOMMENDATION

It is respectfully recommended to the Court of Appeals of Kentucky that Neville M. Tucker be publically reprimanded for unprofessional conduct and required to pay the costs of this action.

This November 12, 1974

HENRY D. STRATTON
VICE PRESIDENT

LESLIE G. WHITMER
DIRECTOR

APPENDIX B

July 22, 1974

CONFIDENTIAL

Neville M. Tucker, Esq.
235 South Fifth Street
Louisville, Kentucky 40202

Re: Complaint of Gloria Jean Brown
East Orange, New Jersey

Dear Mr. Tucker:

Enclosed herewith is a copy of a letter of complaint filed against you by the above-named complainant. Pursuant to the provisions of RCA 3.160, you have fifteen (15) days from the date of this letter to respond to the complaint. This matter will be treated in accordance with RCA 3.170 et sequi.

No contacts or communications shall be undertaken with the Inquiry Tribunal, House of Delegates, Board of Governors, Court of Appeals, or any member thereof. Please observe the provisions of RCA 3.150 and 3.290 with respect to the foregoing communications or contacts.

Please file your response within the stated time to expedite the necessary procedures. If you have any

questions concerning the matter, please contact us.

Sincerely,

Leslie G. Whitmer
Director

LGW/sp
Enclosure
CERTIFIED MAIL